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In the Supreme Court of the United States

OCTOBER TERM, 1978

ACF INDUSTRIES, INC., CARTER CARBURETOR DIVISION,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 577 F.2d 43. The opinion of the district court (Pet. App. A) is reported at 76 F.R.D. 143.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1978. A petition for rehearing was de-

nied on June 22, 1978. The petition for a writ of certiorari was filed on September 16, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, after determining that this was "a classic case of abuse of the discovery process" and that the district court had employed "highly irregular" procedures in sharply restricting the scope of the Commission's lawsuit, properly issued a writ of mandamus ordering withdrawal of that ruling.

STATEMENT

On July 17, 1975, the Equal Employment Opportunity Commission filed suit against Carter Carburetor and two union defendants pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. (1970 ed. and Supp. V) 2000e *et seq.* (App. 8-12; Pet. App. A-6). The Commission alleged that the defendants had discriminated on the basis of race with regard to hiring, promotion, apprenticeship, training, job classification, and discharge; and on the basis of sex with regard to maternity leave and disability benefits (App. 10-11; Pet. App. A-6). It sought injunctive and other appropriate relief (App. 11-12; Pet. App. A-6).

In its first set of eleven interrogatories, filed on August 18, 1975, and amended on December 9, 1975, the Commission sought information about the capabilities of the company's computer system, with the

aim of formulating a request for computerized personnel information that could be produced, copied, and analyzed more efficiently than the company's 17,000 personnel records (App. 13-22, 52-54, 120-127; 3/22/78 letter to the court of appeals after argument; Pet. App. A-9 to A-10). After Carter Carburetor objected to both the original and the amended interrogatories in their entirety, the Commission twice moved to compel answers (App. 52-54, App. 3 [Docket Sheet 11/26/75], 136-137, App. 4 [Docket Sheet 2/9/76]; Pet. App. A-9 to A-10). In August 1976, a year after the service of the first interrogatories and nine months after their amendment, the court denied the Commission the right to obtain any computerized information on the ground that it constituted "trade secrets" (App. 183-184; Pet. App. A-9 to A-10).

A second set of Commission interrogatories, filed September 22, 1975, sought information about the company's organizational structure, officials, and labor policies during the period since Title VII became effective (App. 55-57; Pet. App. A-10 to A-11). Several of the questions sought the names and race or sex of individuals who had been affected by particular employment policies alleged in the complaint (App. 55-57; Pet. App. A-10 to A-11). Carter Carburetor did not answer any of these interrogatories, either. After objections, negotiations, and three and a half months' delay, the company offered, in lieu of answering these interrogatories, certain documents concerning employee benefit policies and access to 17,000 unsorted employee personnel cards, subject to a protective order

and to a prohibition against access to any current employee records during working hours. The company failed to specify which of the 65 interrogatories could be answered by reference to these cards, which by reference to other sources, and which would not or could not be answered at all (App. 79-85, 141, 144-145, 146-147; Pet. App. A-11 to A-12).

After unsuccessful efforts at resolution, the Commission moved, on April 9, 1976, to compel answers (App. 138-147; Pet. App. A-11 to A-12). The district court did not rule on this motion until August 31, 1976, when it ordered Carter Carburetor to make separate answers or specify objections to each interrogatory (App. 184-185; Pet. App. A-12). The company did not comply with this order until October 7, 1976, when it filed its answers and objections specifying for the first time which information it would provide directly and which information it would yield by offering access to its files pursuant to Fed. R. Civ. P. 33(c) (App. 200-223; Pet. App. A-12).

Only at this point was the Commission able to begin meaningful inspection, copying, and analysis of company personnel files on the 17,000 current and former employees (App. 146-147; Pet. App. A-12). In filing its answers, the company acknowledged that the Commission faced 13,000 hours of work.[1] By agreement, that undertaking began on November 3,

[1] Each of the 13 times Carter Carburetor invoked Fed. R. Civ. P. 33(c), it claimed that 1,000 hours were required in order to answer the particular question (App. 200-215).

1976 (App. 307). In accordance with the court's August 31, 1976 order, Commission access to all data on current employees was restricted to non-business hours (App. 184).

While the Commission was awaiting answers to its interrogatories, Carter Carburetor itself filed two sets of interrogatories. On September 2, 1975, the Company served on the Commission its first set of 107 interrogatories seeking facts underlying the lawsuit and sources of further information about them (App. 23-51; Pet. App. A-12 to A-13). On October 7, 1975, the Commission filed its responses to the company's first set of interrogatories, offering to make relevant Commission files available and providing specific answers to information unavailable in these files (App. 74-76; Pet. App. A-13). The Commission then voluntarily produced the files at the St. Louis offices of the company's attorneys (App. 266). Carter Carburetor never challenged the Commission's responses to these questions (Pet. App. A-13).

On August 13, 1976, the company filed its second set of interrogatories (App. 167-182; Pet. App. A-13 to A-14). The interrogatories sought, *inter alia*, identification of every individual, other than those named in the administrative charges, who had been adversely affected by any discriminatory policy alleged in the complaint, or by any other form of race or sex discrimination, as well as the date of each discriminatory act (App. 167-169; Pet. App. A-14). Since the company had not yet specified the information it would provide (see page 4, *supra*), the Commission filed a

timely request for a stay of the time to answer eleven of Carter Carburetor's questions which sought names and specific incidents of discrimination (App. 190-192; Pet. App. A-14). The Commission pointed out that it had not yet had access to company files from which the information could be derived (App. 191; Pet. App. A-14).

In opposing the Commission's motion for stay, Carter Carburetor denied that its questions were premature (App. 234; Pet. App. A-14). It further argued that the Commission could answer the interrogatories on the basis of information currently available and that if it acquired additional information, the Commission could supplement those answers pursuant to Fed. R. Civ. P. 26(e) (App. 234). The district court denied the motion for a stay on November 4, 1976 (App. 238; Pet. App. A-14).

On December 20, 1976, the Commission filed its supplemental responses, invoking Fed. R. Civ. P. 26(e) as the company had suggested (App. 239-246; Pet. App. A-15). In answer to each question seeking names of individual discriminatees and dates of the alleged discrimination, the Commission stated (App. 239-243):

> (a) The Commission is unable at this time to identify * * * individuals [not named in the administrative charges] until it has completed its discovery. The Commission will in accordance with [Fed. R. Civ. P.] 26(e) supplement responses to the Defendant Carter Carburetor's Second Set of Interrogatories to Plaintiff.

> (b) The Commission is unable at this time to state the date of each alleged act of discrimination until it has completed its discovery.

Without objecting to these answers or moving to compel further answers, Carter Carburetor, on December 30, 1976, filed a motion for sanctions against the Commission for what it termed willful refusal to answer interrogatories (App. 247-263; Pet. App. A-15). After filing this motion, Carter Carburetor denied the Commission all further access to its personnel records (App. 307-308; Pet. App. A-15).

At a hearing on the sanctions motion on February 4, 1977, the court ordered the parties to confer, stating that it would subsequently entertain motions to compel and for sanctions if the parties could not agree (App. 284; Pet. App. A-15 to A-16). Counsel agreed on new answers for four of the eleven interrogatories in dispute (App. 310, 300). The Commission said it would supplement its answers to the remaining questions within fifteen days, even though the company was banning access to all relevant files and even though thousands of hours were needed to develop and analyze the microfilm records which Commission attorneys had copied (App. 309-310; Pet. App. A-16). Counsel for Carter Carburetor rejected this offer and immediately wrote a letter to the district judge urging sanctions against the Commission (App. 299-301; Pet. App. A-16).

Without allowing the Commission to respond to this *ex parte* communication, the district court on the following day, February 10, 1977, ordered sanctions

against the Commission under Fed. R. Civ. P. 37 (App. 285-289; Pet. App. A-16). In addition to awarding $500 in attorney's fees, the court stated (App. 288-289):

> For the purposes of this action, the following facts shall be taken to be established:
>
> (1) the defendant Carter Carburetor Company did not discriminate against any person on the basis of race, with the possible exception of [charging parties] Wendell Holmes, Charles Gamble, Otha Lewis, or Charles Peoples, as to which individuals plaintiff shall bear the burden of proof at trial;
>
> (2) the defendant Carter Carburetor Company did not discriminate against any person on the basis of sex, with the possible exception of [charging party] Sandra Moore, as to whom the Commission shall bear the burden of proof at trial.
>
> IT IS FURTHER ORDERED that at the trial of this matter the plaintiff shall be prohibited from offering any evidence as to any discrimination by defendant against any persons other than Wendell Holmes, Charles Gamble, Otha Lewis, Charles Peoples or Sandra Moore.

The Commission noted an appeal on the alternate theories that the ruling was final under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), or that it constituted a denial of an injunction since the court effectively

denied relief except as to the charging parties (App. 318, Comm. Opp. to Motion to Dismiss Appeal, Comm. Br.; Pet. App. A-8 to A-9). The court of appeals found it unnecessary to determine the question of appealability, concluding that mandamus was appropriate since the district court had "exceeded its judicial power in limiting the evidence which the EEOC can present in this case" (Pet. App. A-9, A-16). Noting that the court entered its order after receiving an *ex parte* letter from the company without ever hearing from the EEOC, it found the procedures leading to the sanctions to be "highly irregular." The appellate court summed up the matter in these terms: "This is a classic case of abuse of the discovery process" (Pet. App. A-17).

Accordingly, the court of appeals directed withdrawal of the district court's ruling and suggested that the lower court "establish a strict, but reasonable, timetable for the continuation of discovery" (Pet. App. A-17). Rehearing was denied (Pet. App. A-18), the district court withdrew its order on September 13, 1978, and discovery is proceeding.

ARGUMENT

1. The decision of the court of appeals is not appropriate for review here. The ruling turns on the particular facts of the case, including highly irregular, and uncommon, procedures. In any event, the challenged order does not conclude the case, but merely directs that proceedings, including discovery, be

resumed on the Commission's claims. This Court normally declines to intervene in these circumstances. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 378, 384 (1893).

There are, moreover, special reasons for reluctance here: the district court has withdrawn its order; long-forestalled discovery is again in progress in this action initiated more than three years ago; and the effect of the writ of mandamus is simply to allow resumption of the Commission's work of analyzing company files and providing further responses to company interrogatories. The order does not in any way hamper the company's ability to make its substantive defenses to the Commission's charges of discrimination, and therefore imposes no irreparable injury.

2. Nor did the court of appeals so far disregard traditional standards for issuing mandamus as to call for this Court's intervention. The writ was granted upon a finding that the district court "exceeded its judicial power in limiting the evidence which the Commission can present in this case," and that it followed procedures which were "highly irregular" in entering the order on the basis of an *ex parte* letter without hearing from the Commission. The decisions of this Court teach that these are appropriate circumstances for issuing mandamus. See, *e.g.*, *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); *La Buy*

v. *Howes Leather Co.*, 352 U.S. 249 (1957). However rare the occasions for resorting to mandamus, it has always been recognized that the classic function of the writ is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976); *Will* v. *United States*, 389 U.S. 90, 95 (1967); *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953). This is such a case.

It is no fatal flaw that the court of appeals determined, *sua sponte*, to treat the appeal as a petition for mandamus. Far from being "unprecedented," as the company alleges (Pet. 10), the procedure followed here is well established in prior decisions. See, *e.g.*, *Wilkins* v. *Erickson*, 484 F.2d 969, 971 (8th Cir. 1973); *Woodcock* v. *Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *United States* v. *Moore*, 368 F.2d 990, 991 (9th Cir. 1966); *Leesona Corp.* v. *Cotwool Manufacturing Corp.*, 308 F.2d 895, 897 (4th Cir. 1962); *Arrowhead Co.* v. *The Aimee Lykes*, 193 F.2d 83, 84 (1st Cir. 1951). Nor was the company placed at a disadvantage by the court's action. Although it implies otherwise (Pet. 10), the company did avail itself of two opportunities to present to the court of appeals its position on the appropriateness of mandamus—first in a post-argument letter to the court, and again in its petition for rehearing *en banc*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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